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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 1403

STANLEY AIR TOOLS,
A Division of the Stanley Works,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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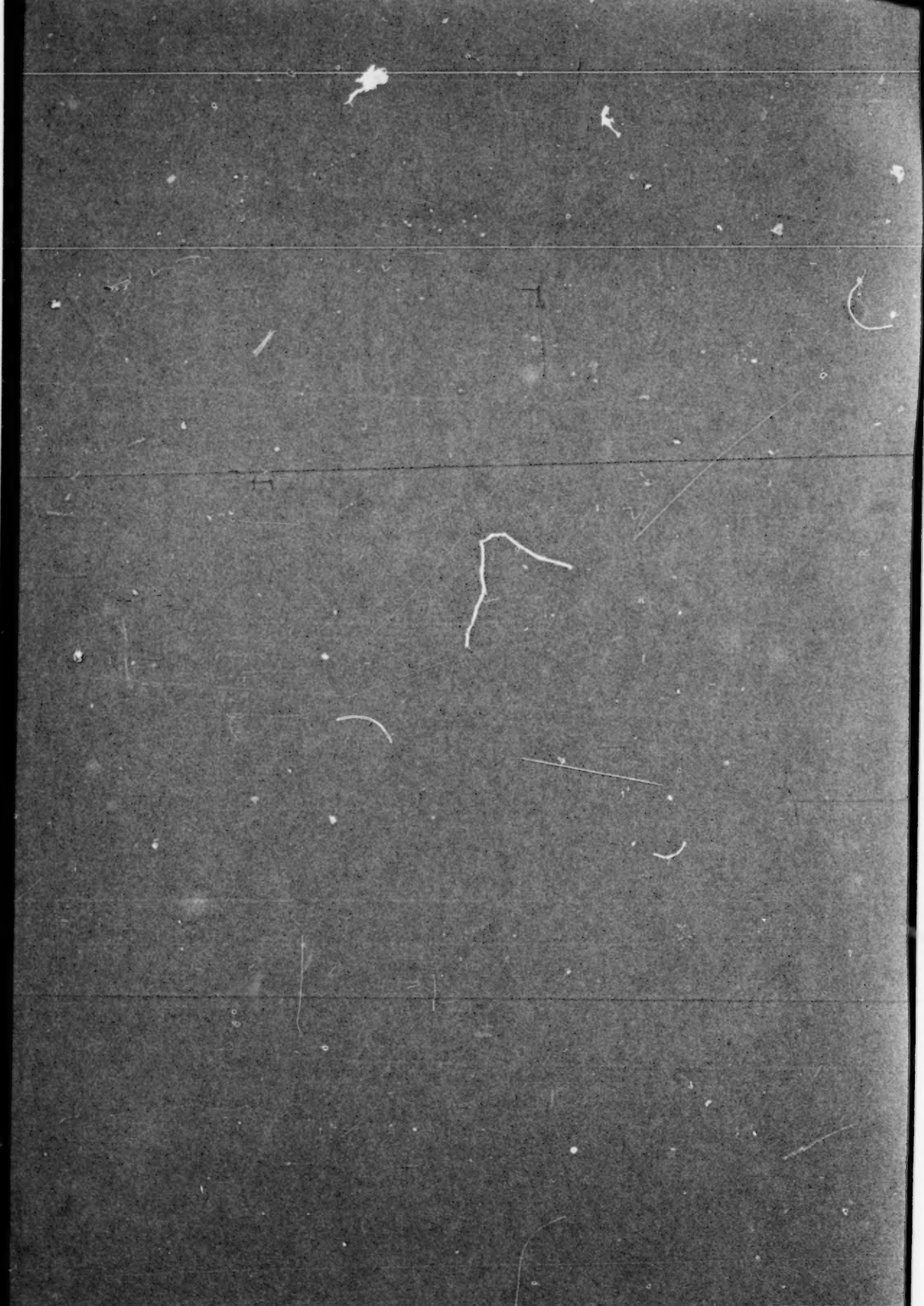

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Statutes.

National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*):

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Stanley Air Tools, Division of the Stanley Works, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals following the Supplemental Decision of the Board, is reported at ___ F.2d ____, No. 20171, 75 LRRM 2430. The Board's initial Decision and Order is reported at 171 NLRB No. 48, 69 LRRM 1407. The Board's Supplemental Decision and Order is reported at 179 NLRB No. 89, 72 LRRM 1403.

JURISDICTION.

The judgment of the Sixth Circuit was entered October 13, 1970. Petitioner's timely petition for rehearing *en banc* was denied December 2, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board, in determining whether an employer's "intermediate" unfair labor practices have rendered the likelihood of a fair rerun election to be slight, must consider—as of the time it issues the order—the current composition of the bargaining unit, including employee and managerial turnover.

2. Whether the National Labor Relations Board, having based a bargaining order upon an inapplicable legal standard, can reissue its order, without a new hearing, by merely rephrasing the original language thereof to reflect the currently-accepted legal theory.

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*) are as follows:

> "Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Sec. 10(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the

same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

STATEMENT.

A. INTRODUCTION.

Almost two years have elapsed since the landmark decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (June 16, 1969). The case at bar relates to that portion of *Gissel* wherein the Court directed the National Labor Relations Board to ". . . take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on the election conditions and the likelihood of their recurrence in the future," and to issue bargaining orders when " . . . the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight . . ." The Board's approach in applying the foregoing mandate was unquestioningly approved by the Sixth Circuit in the case at bar and by the Ninth Circuit in a similar case.[1] A sharp conflict among the circuits arose when the Board's approach to post-*Gissel* cases was scathingly criticized by the Fifth Circuit in *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (1970), cert. denied, ____ U.S. ____, 75 LRRM 2810 (1970). Now the Fifth Circuit has been joined by the Second Circuit[2] as part of a growing judicial reluctance to enforce bargaining orders

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[1] *NLRB v. L. B. Foster Co.*, 418 F.2d 1 (C.A. 9, 1969) *cert. denied*, 397 U.S. 990 (1970).

[2] *NLRB v. General Stencils, Inc.*, No. 265, ____ F.2d ____, 76 LRRM 2288 (January 19, 1971).

based solely on authorization cards. The questions presented herein, having given rise to the foregoing conflict among the various courts of appeal, require immediate resolution by this Court.

B. FACTS OF THE CASE.

1. Background.

Like all *Gissel* cases, the case at bar involves an attempt by a labor organization[3] to organize a group of employees.[4] Although there are several factors which should have caused the Sixth Circuit to question the harsh remedy of a bargaining order—minimal 8(a)(1) unfair labor practices,[5] almost complete turnover of employees, timing of events, and overwhelming rejection of the Union by employees in a Board conducted election[6]—the most unique aspect of this case is that no unfair labor practices (except a single, isolated incident) are attributed to members of management. All other acts of "interference, restraint and coercion" were committed by "working foreman" Jerome Krivdo, who himself was solicited to sign a Union authorization card, whose card was turned over to the local office of the Board as part of the Union's showing of interest and who was invited to attend a Union meeting

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[3] Teamsters Union Local No. 507, hereinafter referred to as the "Union."

[4] The production and maintenance employees at Petitioner's former plant in Willowick, Ohio. There were 12 employees (or 14, if Jerome Krivdo and Anthony Lauria, the two "working foremen" were employees) at all times material herein. Petitioner recently relocated to a larger plant located several miles away, in a different county.

[5] There were no allegations of 8(a)(3) discrimination; nor were there any threats of discharge or reprisal for engaging in union activities.

[6] On April 28, 1967, the employees voted 8-3 against the Union.

just prior to the election. The Board's finding that Krivdo was a supervisor within the meaning of Section 2(11) of the Act was a *sine qua non* of its subsequent determination that Petitioner had violated Sections 8(a)(1) and (5) of the Act.

2. The Employment Status of Jerome Krivdo.

Krivdo was hired as a tool assembler. He was the best assembler in the shop, who not only produced far more air tools than any other employee in his classification, but also assembled the most difficult tools. Krivdo testified (without contradiction) that he spent about ninety per cent of his time working at his bench (located just opposite the bench of Gerald Follas, Krivdo's friend and the principal Union supporter in the shop), and the remainder of his time going to and from the stock room with component parts which were to be assembled. Although Krivdo occasionally recommended wage increases for his fellow employees, these were not granted. (J.A. 48-49; 58; 69; 73; 84-86; 91; 101-103; 106-107; 109-114; 121-125)[7]

Like all other shop employees, Krivdo punched a time clock and wore work clothes. He enjoyed the same fringe benefits and vacations as the other employees, and worked the same hours. He had no authority to assign overtime to other employees. Like the other employees, Krivdo received time-and-one-half for the overtime. (J.A. 50; 63; 103; 112; 134-135)

The finding that Krivdo was a supervisor rested primarily upon his alleged authority to make work assignments. In connection with this, the Board cited plant

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[7] "J.A." refers to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk.

superintendent Tom Whitehouse's remark—taken out of context—that "With 14 people, I can't supervise every man." The Board conveniently overlooked Whitehouse's testimony that, "He [Krivdo] must assign work as I tell him to assign," and his statement that "With 14 people, you see what everybody is doing." (J.A. 116; 118) Krivdo did receive a higher salary than his fellow assemblers, but this was based upon his substantially greater productivity and the fact that he produced the most difficult tools.

Even after the Board's Regional Director ruled that he was a supervisor, Krivdo (along with employees Follas and James Powell) was invited to attend a pre-election meeting at the union hall. (J.A. 128-129; 176-177; 204-205) A full understanding of Krivdo's *actual status* makes even more incredible the Sixth Circuit's affirmance of the Board's ruling that *his* conduct rendered the holding of a fair election "doubtful, if not impossible."

3. The Union Organizing Campaign.

The Union's brief campaign began on Saturday, February 11, 1967, with a meeting at the home of employee Follas. In attendance were a group of employees, including Krivdo, and two union organizers. (J.A. 140, 142) A number of employees signed cards purportedly authorizing the Union to act as the bargaining agent[8] (J.A. 228, *et seq.*)

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[8] Three employees (Ellis, Winpisinger and Hyder) testified that they signed only after Union business agent Friedman told them that the cards would be used only to obtain an election, and were otherwise not binding. It was stipulated at the hearing that a fourth employee, Peggy Bliss, who was unable to testify for medical reasons, would have testified in a like vein. (J.A. 19) In discrediting the testimony of the foregoing em-

(Continued on following page)

The next day, February 12, 1967, Follas solicited authorization cards from Krivdo and from Anthony Lauria, another "working foreman." Follas admitted under cross-examination that during his solicitation of Krivdo and Lauria nothing was said concerning their alleged supervisory status. (J.A. 203-204)

By Monday, February 13, 1967, business agent Friedman had obtained authorizations from 11 persons, including Krivdo and Lauria. He thereupon requested recognition. By letter of February 15, 1967, Petitioner declined to recognize the Union. On February 16, 1967 Friedman filed an election petition with the Board (J.A. 10) and submitted to the Board's regional office all 11 authorization cards, including those obtained from Krivdo and Lauria. (J.A. 145)

4. The Events of February 13-20, 1967.

The Sixth Circuit affirmed the Board's finding that Petitioner, almost entirely through Krivdo, illegally threatened and interrogated employees and wrongfully induced them to revoke their authorization cards. Although

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ployees, the Trial Examiner emphasized "the fact that the employees who testified that the cards were only for an election and not binding otherwise, have remained in the employ of Respondent, thereby continuing an economic relationship which could understandably be affected by their testimony . . ." Had these employees been credited, their cards would be invalid even under the Board's strict standards enunciated in *Levi Strauss, Inc.*, 172 NLRB No. 57, 68 LRRM 1338, 1341 (1968) and the Union would have lacked a majority. In making the foregoing credibility determination, the Trial Examiner ignored the fact that Peggy Bliss had quit her job prior to the hearing. Furthermore, the Court should note that the testimony of employee Hyder *against* Petitioner was given great weight by the Trial Examiner; thus, the reasoning that Hyder's testimony *in favor* of Petitioner could not be credited because of the continuing employment relationship is utterly without merit.

no specific dates were attached to most of these events, a close examination of the record reveals that, in all probability, they occurred between the time Friedman secured the last of the cards (Monday, February 13) and the day most of the card signers signed a revocation petition (Monday, February 20). These dates are important because the Teamsters considered Krivdo and Lauria to be in the bargaining unit at this time. In fact, Follas had just solicited and received Krivdo's signed card. No one was contending that Krivdo was anything but just another worker.

The Board's Decision refers to several "meetings" at which Krivdo allegedly engaged in coercive conduct. The first meeting took place at Krivdo's house. Although the date of this meeting cannot be specifically determined, it may easily be inferred that it took place on or before Thursday, February 16.[9] At this meeting Krivdo was anti-Teamster, but hardly anti-union. He expressed his belief that the UAW might be a better union for the employees since most of the Employer's customers recognized that organization. Krivdo also came out with a farfetched speculation—hardly a threat—that a UAW shop might refuse to do business with a Teamster shop. (J.A. 159-161; 186-191)

The Board found it "significant" that "neither of the Whitehouses ever denied" hearsay testimony to the effect that Krivdo told the employees at this meeting that the Whitehouses had asked him to speak to them. (J.A. 16)

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[9] Employee Powell testified that the meeting at Krivdo's occurred on February 11 or 12. (J.A. 169) Employee Hyder testified that the meeting took place "somewhere within a week" after the cards were signed. (J.A. 159) Although he had difficulty remembering when he signed his card, employee Follas recalled that Krivdo's meeting occurred the same week the Teamsters demanded recognition and "toward the middle of the week."

Apparently, the Board failed to complete reading its own record, for Hugh Whitehouse, Petitioner's general manager, specifically denied ever having given such an instruction to Krivdo. (J.A. 216)

The next meeting also took place that week. It was conducted by one of Petitioner's attorneys, who told the employees that no one was authorized to hold any meetings without the express approval of the Messrs. Whitehouse. Furthermore, he specifically repudiated anything that may have been said at any unauthorized meeting. (J.A. 174-175)

Great significance was attached by the Board to a meeting which was held in the shop on February 20, 1967. This informal meeting was initiated by Employee Bill Manson, who urged that the employees revoke their authorization cards. There was no doubt in anyone's mind that it was Manson's meeting, that he alone was responsible for it and that everyone who spoke up—like Krivdo —was like everybody else in attendance. (J.A. 165-166; 171; 174; 176; 185-186) As a result of the "Manson meeting," six of the individuals who signed cards signed a petition to revoke their cards.[10] (J.A. 243) Admittedly, Krivdo played an important role in the "Manson meeting" and directly induced one employee, Russell Crane, to sign the revocation petition. Yet Crane testified that he signed the revocation petition of his own free will and also stated (along with employee John Winpisinger, who also revoked his card) that no one threatened him or promised any benefits to induce his signature on the document. (J.A. 156-157; 213-214)

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[10] Employee David Ellis had previously written the Board on his own, seeking to revoke his card. (J.A. 209-210; 246)

5. Events of February 21-April 28, 1967.

Over two months elapsed between February 20, 1967 —the day on which the revocation petition was signed— and April 28, 1967, the date of the Board election. Not a single unfair labor practice was found to have been committed in that period. During this hiatus the Union utterly failed to mount an election campaign, except for the aforementioned pre-election meeting which was attended only by Follas, Powell and *Krivdo.*

C. POST-ELECTION DEVELOPMENTS.

Within a year after the election, 8 of the 12 employees whom the Board found eligible to vote had left the bargaining unit. Of the eight, five (including Follas and Hyder) quit; one was promoted; one died; and one was discharged. "Working foreman" Krivdo quit October 6, 1967.

By July 23, 1968 (approximately 15 months after the election) an additional two employees left the bargaining unit leaving just two of the original bargaining unit members on Petitioner's payroll. (J.A. 35-36)

The Trial Examiner issued his Decision and Report on Objections on February 7, 1968. Noting that his findings must take into consideration ". . . the sequence of events, and the time lapse *between the refusal and the unlawful conduct,*" he ruled that Petitioner lacked a good faith doubt of the Union's majority, and had refused to bargain in violation of Section 8(a)(5) of the Act.

In its exceptions to the Trial Examiner's Decision, Petitioner requested the Board to note the substantial employee turnover that had already occurred. Yet, the Board's original Decision and Order issued May 14, 1968,

was a simple *pro forma* adoption of the Trial Examiner's recommendations.

On October 3, 1968, Petitioner filed a Petition For Review with the United States Court of Appeals for the Fourth Circuit. That Court had jurisdiction pursuant to Section 10(n) of the Act by virtue of Stanley Works facilities in North Carolina. The Board had, at that time, taken no steps to enforce its Order.

On July 16, 1969, the Fourth Circuit remanded the case at bar for reconsideration in view of the decision of this Court in *NLRB v. Gissel Packing Company, supra.* On July 21, 1969, Petitioner moved the Board to reopen the record, again stressing the additional turnover that had occurred subsequent to the original Decision and Order. Since the Board's original Order had been based upon Petitioner's supposed "lack of good faith doubt," the remand and motion to reopen the record presented an opportunity to make a contemporaneous finding in accord with the recently-propounded *Gissel* standards; yet the Board did not even deign to rule on Petitioner's motion. Instead, on November 10, 1969, it issued a "Supplemental Decision and Order" (signed by the same three Board members who had approved, *pro forma,* the Trial Examiner's Decision), which merely appended a paragraph of *Gissel*-like language to its earlier findings, and concluded that Petitioner's unfair labor practices fell into the "intermediate" category set forth in *Gissel.*

REASONS FOR GRANTING THE WRIT.

The questions at issue herein involve far more than just a conflict among various courts of appeal (although such a conflict assuredly exists). What actually is involved is whether the right of the Board to punish employers who allegedly violate the Act takes precedence over the statutorily protected right of employees to be represented by labor organizations of their own choice (and conversely, their right to be free from the imposition of an unwanted labor organization).

In "intermediate" situations such as the case at bar, this Court in *Gissel, supra* at 614, after noting that the effectuation of "ascertainable employee free choice becomes as important a goal as deterring employer misbehavior," directed the Board to issue bargaining orders when ". . . the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight. . . ." Respondent respectfully submits that the foregoing language clearly contemplates that the Board must weigh the electoral atmosphere *as of the time it issues its order*. How else could ascertainable employee free choice be protected? This position was emphatically adopted by the Fifth Circuit in *NLRB v. American Cable Systems, Inc., supra,* a case involving unfair labor practices far more serious and extensive[11] than those found by the Board in the instant case.[12] These unfair labor prac-

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[11] Including the discriminatory discharge of two employees (out of 8 in the bargaining unit), instigation of a company union, and coercive threats, interrogations and promises of benefit. *American Cable Systems, Inc.*, 161 NLRB 332 (1966).

[12] The Court's attention is directed, in this regard, to footnote 31 of *Gissel, supra* at 611 wherein various types of unfair labor practices are statistically evaluated in order to determine

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tices notwithstanding, Judge Goldberg wrote as follows at 427 F.2d 448-449:

> "In making its determination on December 3, 1969, that the Company's 1965 violations of § 8(a)(1) and (3) precluded a fair election and necessitated a bargaining order, the Board *specifically refused to consider evidence offered by the Company that a complete turnover in employees and the departure of the only management official involved in the unfair labor practices made a free election possible at that time* . . . .
>
> * * * * *
>
> ". . . We think that on remand the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified."
>
> * * * * *
>
> ". . . In *Gissel* the Court made it plain that a bargaining order issued on the basis of a card majority is not the preferred method of establishing a union's representative status and that such an order should be issued only when in the Board's judgment 'the possibility of . . . ensuring a fair election . . . by the use of traditional remedies, though present, is slight . . .' "
>
> * * * * *
>
> ". . . The order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice."
>
> * * * * *

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their impact on the election process. The most serious of these practices—threats to close or transfer plant operations—are entirely lacking in the instant case.

". . . We think it clear from the foregoing that the Court in *Gissel* clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.

In the instant case the Board made no such finding before it issued the December 3, 1969, bargaining order which we are here asked to enforce. Instead, on remand the Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the Company's 1965 waywardness. We deem such findings insufficient under the teachings of Gissel to justify a 1970 bargaining order. *Gissel does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity—a present view, albeit with an historical prospective.* Industrial democracy should be allowed to work its will if the present conditions are sufficiently septic for an election." (Emphasis added)

American Cable Systems represents the first step in what has obviously become a judicial trend against enforcement of cases where as here, the Board, by applying *Gissel* in a mechanical and routine fashion, has forced unwanted labor organizations upon unwilling employees. Next was Judge McCree's dissent in *G.P.D., Inc. v. NLRB*, 430 F.2d 963, 965-66 (C.A. 6, 1970).[13] Then came the

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[13] "Under this [*Gissel*] standard, I believe it was incumbent upon the Board to determine whether at the time it reaffirmed the bargaining order, the electoral atmosphere was still so contaminated by the company's earlier unfair labor practices that a fair election was unlikely. . . . No new hearing was conducted, nor was any new evidence adduced, following our remand order.

* * * * *

I cannot understand how the Board could determine at the time of its supplemental decision that the possibility of

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decision of the Second Circuit in *NLRB v. General Stencils, Inc., supra.* The factual situation in *General Stencils* is even closer to the case at bar than is *American Cable Systems,* since virtually all the 8(a)(1) interference therein was attributed to one man (the company's secretary and general manager) who, like Krivdo, worked alongside the other employees in the plant. As the court noted at 76 LRRM 2291, "A man working in overalls alongside the other employees is hardly . . . 'high . . . in the company hierarchy' even though he is the highest the workers saw." In vacating the bargaining order, and remanding the case to the Board for further findings and conclusions, the court added, at 76 LRRM 2296:

> "In this connection the Board may find it desirable to take additional evidence with respect to employee turnover. See *NLRB v. American Cable Systems, Inc.,* [citation omitted] and the dissent of Judge McCree in *G.P.D., Inc. v. NLRB,* [citation omitted] or on other matters—a course that would seem particularly appropriate in light of the fact that the case was tried *on the basis of a legal standard different from that now applying.*" (Emphasis added)

The foregoing interpretation of *Gissel* is evident even in some cases wherein the Board has obtained enforcement. For example, in *NLRB v. Drives, Inc.,* No. 18243, ____ F.2d ____, 76 LRRM 2296 (C.A. 7, January 20, 1971) only a series of *post-election* discriminatory discharges

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'ensuring a fair election . . . by the use of traditional remedies, though present, [was] slight,' when it received no evidence concerning contemporary conditions at G.P.D., Inc. Furthermore, I think that only by considering evidence of existing conditions could the Board properly discharge its obligation to promote the Congressionally stated purpose of guaranteeing the rights of *employees* to bargain collectively through representatives of *their* own choosing."

enabled the court to reluctantly overlook the union's substantial defeat in a Board election.[14]

There are two principal reasons for this growing judicial reluctance to enforce *Gissel* bargaining orders. First, and most important, is that the unions involved in these cases simply do not represent a majority of the employees who will be required to live with them. With all due respect to the assertion in *Gissel* that "There is, after all, nothing permanent in a bargaining order," the courts of appeal have realistically concluded that bargaining orders are far more permanent than this Court would have liked to believe.[15] Thus, the Fifth and Second Circuits, in "intermediate" situations where, as here, the alleged unfair labor practices were far from flagrant, have concluded that the employees' statutory right to be represented by a labor organization of their own choosing takes precedence over the Board's right to penalize employers for their waywardness. Unlike the Board, these courts are more concerned with the rights of employees who labor now and in the future, than with a completely different group of employees who, years ago and perhaps in greatly different circumstances, executed authorization cards.[16]

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[14] See also Judge Waterman's dissent in the original opinion in *NLRB v. Marsellus Vault & Sales, Inc.*, reported at 72 LRRM 2391.

[15] For example, in fiscal 1968, the Board conducted a total of 8317 elections of which only 244 were of the employee decertification type, *Thirty-Third Annual Report of the National Labor Relations Board* (1968). For fiscal 1969, only 298 of a total of 8416 elections were of this type, *Thirty-Fourth Annual Report of the National Labor Relations Board* (1969). Furthermore, the Board's recently established doctrine relating to employer decertification petitions, as enunciated in *United States Gypsum Company*, 157 NLRB 652 (1966), has made it almost impossible to pursue that alternative course of action.

[16] The Board's objectives, on the other hand, are more punitive. Even though it might be demonstrated that not a

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The second reason for judicial opposition to *Gissel* bargaining orders relates to the Board's application of post-*Gissel* legal standards to pre-*Gissel* cases. As the Seventh Circuit held in *NLRB v. Drives, Inc., supra,* at 76 LRRM 2306:

> ". . . To use the evidence that was presented and evaluated under the 'good faith doubt' standard to achieve the same result under a different label, without first considering the interests of a substantial number of employees who opposed the union, would disregard the force of the arguments that led to the demise of the 'good faith doubt' test."

The circumstances of the Board's abandonment of the "good faith doubt" test need no further explication. Yet, had the instant case originally been tried under the legal standards enumerated in *Gissel,* Petitioner could have introduced substantial evidence to the effect that the activities of Krivdo—even if they were unfair labor practices—never rendered the holding of a fair election unlikely or impossible. Furthermore, in view of at least four post-*Gissel* cases,[17] where the unfair labor practices were far more serious than those found by the Board herein, it is abundantly clear that no bargaining order would have issued in this case except for the fact that Petitioner was

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single employee presently desires to be represented by a union, the Board has held that it will push ahead with a bargaining order based solely on authorization cards. See *Gibson Products, Co.,* 185 NLRB No. 74, 75 LRRM 1055 (1970) for a statement of the Board's intention to disregard *NLRB v. American Cable Systems, supra.*

[17] *Poughkeepsie Newspapers, Inc.,* 177 NLRB No. 125, 71 LRRM 1584 (1969); *Schrementi Bros., Inc.,* 179 NLRB No. 47, 72 LRRM 1481 (1969); *Stoutco, Inc.,* 180 NLRB No. 11, 73 LRRM 1107 (1969); *Blade-Tribune Publishing Co.,* 180 NLRB No. 56, 73 LRRM 1041 (1970).

unfortunate enough to be judged under the "good faith doubt" rule. The Board, of course, has never attempted to justify the differences between the instant case and the four in which no bargaining order issued. Such decisional vagaries prompted the following statement from Judge Friendly in *NLRB v. General Stencils, Inc., supra* at 76 LRRM 2296:

> "The Supreme Court's emphasis, in fn. 32 of the Gissel opinion, on the respect to be given the Board's decisions concerning the appropriate remedy surely was not meant totally to overrule in this area the famous statement in *Universal Camera Corp. v. NLRB*, [citation omitted] that 'Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function,' including the responsibility placed on them by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), to prevent capricious determinations by administrative agencies . . . Bargaining orders are not immune from the great principle that like cases must receive like treatment."

It is now clear that the battle lines between the Board (supported by various courts of appeal) and other courts of appeal which existed prior to *Gissel*, have been redrawn. *Gissel* has failed to stifle judicial opposition to the Board policy of imposing *de facto* minority unions upon employees. Although its mechanistic approach has received unquestioning judicial support from at least two courts of appeal (including the Sixth Circuit in the case at bar), the Board's unyielding refusal to consider alterations in the identity in the bargaining unit *under any circumstances* (as outlined in footnote 16, *supra*) is contrary to the ultimate objective of *Gissel*: namely, the effectuation of employees' right to be represented by labor organizations of their own choice. Petitioner respectfully predicts

that unless this Court intervenes to resolve the foregoing impasse, judicial review will be premised on at least two entirely different standards, and the outcome of cases will be determined by the choice of forum rather than a uniform rule of law. Since almost two years have elapsed since *Gissel*, the time is ripe for a resolution of this conflict by this Court.

CONCLUSION.

The Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS S. BELKIN,
Attorney for Petitioner,
Stanley Air Tools,
Division of The Stanley Works.

BELKIN, BELKIN & GOLDSTEIN CO., INC.,
(A Professional Corporation)
Of Counsel.

APPENDIX.

DECISION OF TRIAL EXAMINER.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 8-CA-4634.

STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,

and

TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA.

Case 8-RC-6659.

STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,

Employer,

and

TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioner.

TRIAL EXAMINER'S DECISION AND REPORT ON OBJECTIONS TO AN ELECTION.

STATEMENT OF THE CASE.

WILLIAM W. KAPELL, Trial Examiner: This matter, a proceeding under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, was

heard at Cleveland, Ohio, on September 18 and 19, 1967,[1] with all parties participating pursuant to due notice upon a [2] complaint issued by the General Counsel on July 3.[2] The complaint alleges that Stanley Air Tools, Division of the Stanley Works, hereafter referred to as Respondent, engaged in unfair labor practices proscribed by Section 8(a) (1) and (5) of the Act, by specified acts of interferences, restraint, and coercion of its employees, and by a refusal to recognize and bargain with the Union as the duly designated exclusive collective-bargaining representative of its employees in a unit appropriate for bargaining purposes. Respondent denied all allegations of unlawful conduct, and also, in particular, denied the supervisory status of employees Jerry Krivdo and Tony Lauria, the alleged violative conduct attributed to its agents, and the alleged majority status of the Union, and affirmatively pleaded that it had a good-faith doubt of any status, and that the alleged violative conduct of Krivdo and Lauria, if any, was unauthorized and repudiated.

A Decision and Direction of Election in Case 8-RC-6659 issued by the Regional Director for Region 8 on March 31, following a hearing on a union petition for certification, provided for an election in a designated unit of Respondent's employees consisting of production, maintenance, and warehouse employees, and determined that employees Krivdo and Lauria were supervisors and therefore excluded from the unit. The employer's (Respondent's) request for a review of the Regional Director's Decision and Direction of Election was denied by the Board

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[1] All dates hereafter refer to the year 1967 unless otherwise noted.

[2] Based upon a charge filed by Teamsters Union Local No. 507, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter referred to as the Union.

on April 18. Thereafter, following the Union's defeat by a vote of eight to three at an election held on April 28, it filed objections to Respondent's conduct affecting the results of the election. On July 3, the Regional Director issued an order directing a hearing on the objections filed by the Union, and further directing that said hearing be consolidated for purposes of hearing with the hearing in Case 8-CA-4634.

All parties were represented and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. Comprehensive briefs received from the General Counsel and Respondent have been carefully considered. Upon the entire record in the cases, and from my observation of the witnesses, I make the following:

Findings of Fact.

I. Commerce.

Respondent, a Connecticut Corporation with its principal office and place of business in New Britain, Connecticut, maintains a division called Stanley Air Tools at Willowick, Ohio (the only installation involved herein), where it is engaged in the manufacture of air tools. Annually in the course and conduct of its operations, Respondent ships products valued in excess of $50,000 directly from its Willowick division to points located outside the State of Ohio. Respondent admits, and I find, that at all times material herein it has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[3] II. The Labor Organization Involved.

Respondent admits, and I find, that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices.

A. The Disputed Supervisory Status of Krivdo and Lauria.

The complaint alleges, and Respondent denies, that employees Krivdo and Lauria are supervisors within the meaning of the Act. Their status vitally affects or is dispositive of several issues raised herein. As noted above, the Regional Director in the representation proceeding involved herein issued an order, following a rather extensive hearing, in which he determined, *inter alia,* that both individuals were supervisors. A request for review of the Regional Director's order filed by Respondent, directed exclusively to this finding, was denied by the Board.

B. Respondent's Right To Relitigate the Supervisory Status of Krivdo and Lauria.

On the hearing herein, Respondent sought to relitigate the supervisory status of Krivdo and Lauria over the General Counsel's objection and was permitted to introduce evidence to supplement the record of the representation case (of which official notice was taken). General Counsel in his brief again raises the propriety of this ruling, contending that the supervisory status of Krivdo and Lauria was resolved by the Board and is, therefore, binding and may not be relitigated. He asserts that *Amalgamated Clothing Workers (Sagamore Shirt Co.) v. N. L. R. B.,* 365 F.2d 898 (C.A.D.C.), which was cited in support of the ruling is inapposite. I adhere to my ruling.[3]

Section 102.67(f) of the Board's Rules and Regulations provides as follows:

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[3] As appears hereafter, a reversal of the ruling would not effect any change in my findings on the disputed status.

> The parties may, at anytime waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent affair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

The application of this section depends upon the nature of the issue which a party seeks to have relitigated. Thus, where a certification is issued in a representation proceeding and an attempt is made to relitigate the certification in a subsequent unfair labor practice proceeding involving [4] a refusal to bargain, it clearly follows that the proceeding is related within the meaning of the above-cited section and further litigation will be precluded.[4] However, where other representation case issues are reraised in subsequent unfair labor practice proceedings, the answer is not so clear, e. g., as in the instant case, where the supervisory status of an individual which has been determined in a prior representation proceeding, becomes material in a subsequent unfair labor practice case involving the employer's responsibility for the individual's conduct. In such instances, in addition to considering the relationship between the representation proceeding and the unfair labor practice proceeding, it is also necessary to ascertain whether the specific issue reraised for litigation was one which was fully litigated in the representation proceeding. The court in *Amalgamated Clothing Workers (Sagamore Shirt Co.), supra,* considered the relitigation issue in great detail, reviewing

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[4] See *Genesco, Inc.*, 161 NLRB No. 98, and cases cited therein.

several Board decisions in the matter, and held contrary to the Board, that the supervisory status of the employee (whose activities were held to constitute 8(a) (1) violations), could be relitigated in the unfair labor practice case despite findings by the Regional Director in the prior representation proceeding concerning the disputed status, but that the evidence heard in the representation case need not be re-heard but could be incorporated in the record of the unfair labor practice being case upon being specifically identified.

In reaching this result, the court concluded that it was in accord with the Board ruling in *Leonard Niederriter Co.* (130 NLRB 113, 115, footnote 2), where a similar issue arose, and stated further at 905:

> This construction of Section 102.67(f) of the Board's rules, which estop relitigation in a related proceeding, is in accordance with the long-held objective of avoiding undue and unnecessary delay in representation elections. There will be cases where an employer will be as interested as the Board in holding a speedy election and will be willing to forgo the presence of a given employee in the unit or his vote in the tally. We see no basis for assuming that the Board wishes to require such an employer to delay the election while he completely relitigates subsidiary questions, such as supervisory status, in an effort to protect his rights in the future on matters other than the determination of the unit and eligible voters therein. [Footnote omitted.]

The court then concluded that a charge of interference with organizational rights in the unfair labor practice case was not so "related" to a prior representation proceeding as to foreclose relitigation of the supervisory status issue which was ruled upon in the prior representa-

tion case. The court, however, cautioned that it would not necessarily find that relitigation may never be precluded, e.g., where a certification or the composition of a unit is involved.[5] See also *Heights Funeral Home, Inc. v.* [5] *N. L. R. B.*, __ F.2d __ (C.A. 4), No. 24023, November 22, 1967, where the court comprehensively quotes from and adopts the rationale and findings of the *Sagamore Shirt Co.* case *supra,* regarding relitigation of supervisory status.

C. The Supervisory Status Findings.

Comparatively little supplemental evidence was admitted in the instant hearing relative to the supervisory status of Krivdo. The uncontradicted evidence pertaining to his status, shows that the employees were informed at a meeting by management that Krivdo and Lauria were working foremen in their respective areas (Krivdo in assembly and Lauria in machining); that management told employees somebody (Krivdo or Lauria) who was working in the plant was needed to distribute the work and see that the work was done; that in distributing the work Krivdo used his independent judgment in assessing the skill required to perform the specific job and then determined which employee possessed the requisite skill to perform that job; that Krivdo and Lauria reported directly to Thomas Whitehouse, the superintendent of the manufacturing operation; that they were expected to report any employee misconduct in their respective groups

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[5] I find little significance in the General Counsel's attempt to distinguish the instant case from the *Sagamore* case on the ground that no appeal was taken to the Board from the Regional Director's supervisory finding in that case. The Court's ruling is founded primarily on the "unrelatedness" of the supervisory issue between the representation and the unfair labor practice proceeding.

to Whitehouse; that Krivdo received a salary 20 percent greater than the next highest paid employee in his group (Lauria received a salary 15 percent greater than the next highest paid employee in his group); and that on one occasion when an employee challenged Krivdo's authority to direct the manner in which he was performing a job, Krivdo reported the matter to Thomas Whitehouse who ordered the employee to follow Krivdo's instructions because, as he stated, "with 14 people, I can't supervise every man."

It is well settled that the enumerated list of supervisory powers in Section 2(11)[6] of the Act qualifying an employee as a supervisor is to be read in the disjunctive.[7] However, in the performance of one of the functions listed in Section 2(11), the individual must also display true independence of judgment in implementing his authority. *Poultry Enterprises, Inc. v. N. L. R. B.*, 216 F.2d 798, 802 (C.A. 5). I find and conclude that Krivdo was endowed with supervisory authority to assign work in accordance with his independent judgment, and that he had the responsibility to see that the work was done. I, therefore, conclude based on all the evidence, and in particular on his responsibility to assign and direct the work of the employees in his group, that he was a supervisor within the meaning of Section 2(11), despite his lack of other powers [6] listed in that section, such as the right to hire,

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[6] The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[7] *Ohio Power Company v. N.L.R.B.*, 176 F.2d 385 (C.A. 6), cert. denied 338 U.S. 899.

fire, etc., which Respondent strongly urged as for refuting his supervisory status.[8]

The evidence pertaining to Lauria's supervisory status in the representation hearing was rather brief in comparison with that submitted for Krivdo. Accordingly, at the hearing herein detailed evidence was submitted to supplement the representation hearing. This evidence reflected to a large degree the lack of supervisory powers conferred on Lauria paralleling such evidence which was submitted in connection with Krivdo's status at the representation hearing. As indicated above, such evidence is not inconsistent with a finding of a supervisory status. At the representation hearing, Respondent conceded that the authority of Krivdo and Lauria was "exactly the same," and each was responsible for "seeing that the work gets done" in his respective area. Respondent also admitted in the instant hearing that they possessed similar powers in their respective areas. Accordingly, I conclude that Lauria like Krivdo is also a supervisor within the meaning of Section 2(11) of the Act.

D. The Union's Organizing Campaign.

Pursuant to a telephone call from a few of Respondent's employees, Allen Friedman, the Union's business agent and organizer, accompanied by a steward of another local of the Teamsters, visited the home of employee Gerald Follas on February 11. There he met Follas and employees Kim Hyder, James Powell, John Wimpisinger,

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[8] It is also significant to note as the court pointed out in the *Sagamore Shirt Co.*, case, *supra,* 905 that "The findings of the Regional Director may be accorded 'persuasive,' a kind of administrative comity aiding the Examiner and the Board in reaching just decisions, subject however to power of reconsideration both on the record already made and in the light of any additional evidence that the Examiner finds material and helpful to a proper resolution to the issue."

and Richard DeWitt. Later they were joined by employees Dave Ellis and Russell Crane. During that day and on the following day union authorization cards were solicited and obtained from 11 employees consisting of Follas, Hyder, Powell, Wimpisinger, DeWitt, Ellis, Crane, Gary Kipps, Peggy Bliss, Krivdo, and Lauria.[9] On the morning of February 13, Friedman having in his possession the 11 signed authorization cards sent a telegram to Respondent stating, *inter alia,* that the Union represented a majority of the production, maintenance, and warehouse employees, and requesting negotiation for a collective-bargaining contract. By letter of February 15, Respondent advised the Union that it declined to recognize it, claiming that the Union did not represent the majority of the employees and raising a question as to the appropriate unit. On February 16, the Union filed a petition for an election in Case 8-RC-6659 for a unit consisting of the production, maintenance, shipping and receiving employees.

[7] *E. The Alleged Violations of Section 8(a)(1).*[10]

1. Threats and interrogation.

The complaint alleges that on or about February 16, Krivdo threatened several employees that their support of the Union would result in loss of business, and could cause their discharge; that on or about February 16 and 17, Krivdo interrogated employees regarding the number of union meetings, the identity of the union organizers and the nature of employee grievances; that on February

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[9] The validity and the effect of the cards are discussed hereafter.

[10] After the General Counsel rested, Respondent's motion to dismiss paragraph 6(g) of the complaint (threats to move the plant if the Union prevailed) was granted without opposition.

20 Krivdo threatened employees in the plant with discharge if the Union came in; and that on February 20, and thereafter, Krivdo solicited and induced employees to revoke their membership in, and withdraw from, the Union.

In support of these allegations, the General Counsel introduced uncontradicted testimony from employee Hyder as follows: Within a week after he had signed a union card he was invited by Krivdo to attend a meeting at his home where he met employees Powell, DeWitt, Follas, and Crane. Krivdo cautioned them not to make any hasty decisions and told them that it would be preferable to have the UAW (United Auto Workers) represent them rather than the Teamsters because many of the Company's customers were engaged in the automotive industries and recognized the UAW, and that this could make a difference as far as selling to them because a plant controlled by the UAW might not want to buy from a plant controlled by the Teamsters.[11] Within the following week Krivdo asked him at the plant whether the Union had promised coffee breaks. About 2 weeks later he attended a shop meeting at the plant during working hours, at which Krivdo and Lauria were also present. Thomas Whitehouse also attended during part of the meeting. In a discussion with employee Powell at this meeting, Krivdo stated that even with the Union, all they had to do was to give out three (warning) slips and you would be let go, that there was no job security with the Union, and that there was no need for a union.

Employee Powell testified without contradiction that about a week after signing his union card, Krivdo engaged him in a conversation at the shop, in which he

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[11] Follas also testified that Krivdo favored the UAW over the Teamsters.

asked (1) whether the Union could guarantee him that he would not be fired if he came in 20 minutes late, (2) whether the Union could guarantee that he would not be fired if he performed his "war dance" (a bit of tomfoolery engaged in at the plant on occasion), and (3) whether the Union could guarantee him a coffee break. Upon Powell's answer in the negative to each of these questions, Krivdo stated that he could give such guarantees. Powell testified further that at a shop meeting around February 20 attended by several production and maintenance employees, [8] Krivdo and Lauria, he stated that the Union could give them job security. Krivdo replied that it did not mean anything, and that he could give him three warnings and he would be discharged.[12]

"Statements by a supervisory employer in the nature of a threat to prevent unionization of employees constitutes a violation of Section 8(a) (1) of the Act. This is so even though the statements may not be directly coercive, if they could be reasonably so construed by the employees [citations omitted]." *N. L. R. B. v. Electric Steam Radiator Corporation,* 321 F.2d 735, 736 (C.A. 6). Applying this principle to Krivdo's remarks, I find that they constituted statements in the nature of threats that employees would or could be deprived of existing benefits and subjected to discharge. I, accordingly, find and conclude the employees were coerced or tended to be coerced in the free exercise of their statutory rights under the Act in violation of Section 8(a)(1).

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[12] Employee Follas, who also attended the meeting corroborated the testimony about the three warnings followed by a discharge, and also stated that Krivdo advised them that one of the Whitehouses wanted him (Krivdo) to talk separately to each of the employees but that he declined to do it that way.

2. Inviting employees to bypass their representative and deal directly with management concerning complaints.

The complaint alleges that on or about February 17, Hugh Whitehouse invited employees to bypass their chosen bargaining representative and deal directly with him concerning complaints. Employee Follas testified that about a week after signing his card, Hugh Whitehouse invited him to have a cup of coffee in the plant during which he questioned him concerning his problems in the plant, and told him that his door was always open, that if he had anything to say to come and talk to him, and that things had not changed. Whitehouse testified that after receiving the Union's request for recognition, he had a conversation with Follas in which he stated that that there were grievances, and that they had always taken them up together in the past, and he saw no reason why they could not continue to do so. Also, in the letter dated February 16 from Hugh Whitehouse to the employees, they were invited to bring their problems to him.

By such conduct, Whitehouse made it clear by word of mouth and in writing that the employees should bring their grievances directly to management without proceeding through the Union. This was calculated to undermine the need for a union and thereby interfered with employees in the exercise of their free choice of bargaining representative in violation of Section 8(a)(1). *Trend Mills, Inc.*, 154 NLRB 143, 152; *American Manufacturing Company of Texas*, 139 NLRB 815, 816.

3. Soliciting, assisting, and inducing employees to revoke their union Membership.

The uncontradicted testimony of employee Crane shows that he declined signing the petition to revoke his union authorization when requested to [9] by employee

Peggy Bliss, but later changed his mind and signed after Krivdo aproached him and told him that even with the Union in the plant he could be discharged after receiving three warning slips. Prior to that time Crane had never heard of any employee receiving a warning slip. Follas testified without contradiction that during the week following the signing of the union cards, Krivdo told him to attend a meeting in the testing room of the plant during working hours. At the meeting which was attended by Krivdo, Lauria, and several rank-and-file employees, Bill Manson, one of the rank-and-file employees, held up a card stating that it was a withdrawal from the Teamsters Union, and also said that he did not know why they wanted a union and was sure that the Whitehouses could work out any grievances. While the meeting was in progress Follas observed that Tom Whitehouse walked by, looked in, and then walked away. Follas also testified that in a conversation with Krivdo he was informed that employee Ellis had sent a letter to revoke his union authorization, and that he wished Follas would do the same, otherwise he might find himself as the only one who failed to revoke his union card.[13] Whitehouse, however, testified that he never saw the revocation petition until the hearing and had never authorized anyone to prepare it.

It is evident that Respondent knowingly permitted both his supervisors and rank-and-file employees to encourage and solicit employees to sign the petition to revoke their union cards during working time in the plant. Furthermore, Respondent's letter to its employees also clearly indicated that it favored the revocation of their

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[13] The letter to employees from Hugh Whitehouse, referred to above, also advised the employees that they had the right to revoke their union authorizations and could do so in writing.

union cards and advised them how it could be done. Regardless of the supervisory status of Krivdo, Respondent is responsible for his conduct in assisting and soliciting card revocations because it never indicated a repudiation of such conduct despite its awareness of his activities on its premises.[14] Respondent's contention that the speech of its attorney to the employees in the plant in which he stated that only the Whitehouses could authorize employee meetings repudiated Krivdo's talks to employees is without merit. The record fails to indicate that Respondent ever repudiated what was said by Krivdo to the employees. Also, I find no merit in Respondent's contentions that it must have authorized or have been aware of Krivdo's statements or conduct before it can be held responsible for them, or that inasmuch as Krivdo and Lauria worked so intimately with a small group of employees their statements cannot be attributable to Respondent. See *Webb Tractor and Equipment Co.*, 167 NLRB No. 46. It is also significant to note that neither of the Whitehouses ever denied testimony to the effect that Krivdo was asked by one of them to speak to the employees, or did anything to disavow what he might have said to them. I, accordingly, find and conclude that Respondent, in appearing to approve and urge, if not actually to promote, the solicitation of employees to revoke their union cards, interfered with the statutory rights of the employees in violation of Section 8(a)(1) of the Act.[15]

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[14] Furthermore, Manson could be regarded as speaking for management inasmuch as the meeting was being held during working hours in the plant with the apparent permission and approval, if not the assistance, of management.

[15] Ellis, apparently, acted independently in sending a letter to the Union revoking his card.

[10] 4. The alleged creation of an impression of surveillance of employee union activities.

The complaint alleges that during the week of February 20, Lauria created an impression of surveillance of employee union activity. The only evidence submitted in support thereof consists of a conversation between Lauria and Follas in which the latter was told: "Everything that you say, you know, goes right back to Tom and Hugh Whitehouse." In response Follas expressed his unconcern and reiterated his union support. I find that Lauria's remark was an isolated incident told in a friendly manner and that there is no evidence to indicate that it tended to interfere or interfered with, or coerced Follas in any way. I conclude that the General Counsel has failed to show by a preponderance of the evidence that the remark was violative of Section 8(a)(1). Cf. *Jervis Corp. v. N.L.R.B.* __ F.2d __ (C.A. 6), 67 LRRM 2064. See also *Hicks Powder Company*, 168 NLRB No. 103.

5. The alleged interrogation of employees.

The complaint alleges that on or about February 16 and 17, Krivdo interrogated employees regarding the number of union meetings, the identity of union representatives, and the nature of employees' grievances. Employee Hyder testified without contradiction that about a week after signing his union card, Krivdo questioned him concerning the Union's promises relative to coffee breaks and working hours. Follas testified that about the same time he had a conversation with Krivdo, in which he was questioned as to how many union meetings had been held and who represented the Union. It also appears, as related above, that Hugh Whitehouse and Krivdo questioned Follas as to employee complaints.

Not every interrogation is a violation, the test is "whether under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." *Blue Flash Express, Inc.*, 109 NLRB 591, 593. See also *General Automation Manufacturing, Inc.*, 167 NLRB No. 66. I find that in a background of employer hostility to the Union's organizational efforts, which became evident as soon as Respondent became aware of the Union's organizing campaign, such interrogation tended to interfere with the free exercise of employees statutory rights in violation of Section 8(a)(1). See also *Jervis Corp. v. N.L.R.B., supra; N.L.R.B. v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 423 (C.A. 6). Nor would the fact that the interrogation was made in a casual manner during a friendly conversation in an informal context (as claimed by Respondent) lessen its unlawful effect. *General Automation Manufacturing, Inc., supra; Arkansas Grain Corp.*, 160 NLRB No. 28.

F. The Alleged Violation of Section 8(a)(5).

The complaint alleges that since on or about February 15,[16] Respondent violated Section 8(a)(5) by its refusal to recognize the Union as the [11] exclusive bargaining representative of a unit[17] of its employees. There is no dispute regarding the appropriateness of the unit, the demand for recognition by telegram of February 13, or Respondent's refusal to recognize the Union in its letter of February 15, in which it denied the Union's majority

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[16] At the hearing the date was stipulated to be February 13.

[17] All production and maintenance employees at the Employer's Willowick, Ohio, plant, including shipping and receiving employees, and regular part-time employees, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

status and suggested the filing of a representation petition to determine representation. The only issues remaining are whether the Union represented a valid majority of the employees in the appropriate unit, and whether Respondent had a good-faith doubt of the Union's majority status.

1. The Union's card majority.

The parties stipulated that the appropriate unit consisted of at least the following 12 employees out of a possible 14: Peggy Bliss, Russell Crane, Richard DeWitt, David J. Ellis, Gerald W. Follas, Kim Hyder, James D. King, Gary G. Kipp, Wilfred A. Manson, James Powell, Joseph Tessman, and John Wimpisinger. Respondent's assertion that Krivdo and Lauria also were members of the unit was denied by the General Counsel on the ground that they should be excluded because of their supervisory status. As noted above, Krivdo and Lauria were found to be supervisors and, accordingly, are thereby excluded from the appropriate unit. The General Counsel submitted union cards signed by the following employees: Crane, Hyder, Powell, Ellis, Wimpisinger, and Follas (all of whom acknowledged their signatures on the cards), DeWitt and Kipp (who signed in the presence of Follas), and Peggy Bliss (the authenticity of whose signature was stipulated).[18] I find as testified to by Business Agent Friedman that the above-signed cards were in his possession on February 13 when he sent his telegram to Respondent requesting recognition.

Respondent, however, contends that the cards of Ellis, Hyder, Wimpisinger, and Bliss cannot be counted in computing the union's majority because they were induced

[18] Respondent does not contest the authenticity of the signatures on any of these cards.

to sign through misrepresentations of Friedman. The evidence adduced pertaining to the circumstances attending the signing of the cards is as follows: Ellis testified that he signed a card at the meeting in Follas' home after he asked Friedman whether the card was to petition for an election and Friedman replied that it was. Wimpisinger testified that Friedman told the employees the cards would not be binding and a majority of the cards was needed to have an election. Hyder testified that Friedman told them that the cards were necessary to be able to get a vote, that other than that were not binding at all, that they were for job security and that he did not say the cards were to be used only to get an election. It was stipulated that if Bliss were called to testify she would state that Friedman told the employees at Follas' home that the purpose of signing the cards was to obtain an election and that they would not otherwise be binding.[19]

[12] Friedman denied telling any employee that the cards were to be used only to get an election or that he needed a majority of the cards to get an election, or that they were not bound by the cards except for an election. He asserted that he told the employees that the cards were to be used to obtain bargaining rights and were not limited to getting an election. Crane testified that he did not remember whether Friedman told him that signing the cards did not bind him or that all he wanted was an election.

Thus, there is a sharp contradiction in the testimony as to whether or not the employees were told that the cards were only for an election or words to that effect, and would not bind them otherwise. Based on the demeanor of the witnesses, and also considering the sequence of events, namely, Respondent's expressed opposition to the

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[19] Because of a fear of pregnancy complications if she appeared, the parties stipulated that she would so testify, if called.

Union and its attempts to undermine it, and the fact that the employees, who testified that the cards were only for an election and not binding otherwise, have remained in the employ of Respondent, thereby continuing an economic relationship which could understandably be affected by their testimony, and the lapse of about 8 months before they were called upon to testify, I credit Friedman's testimony, which impressed me as being forthright and positive, that he told the employees the cards were needed to obtain bargaining rights and were not limited to obtaining an election.

"Where an employee has signed a card which plainly designates the Union as bargaining agent, the employer can prevail only with clear evidence of misrepresentation. *N.L.R.B. v. Hamburg Shirt Corporation,* 371 F.2d 740, 745 (C.A.D.C.). Or as recently stated by the court in *Dayco Corporation v. N.L.R.B.,* 382 F.2d 577, 582 (C.A. 6):[20]

> A card, making no mention of an election, but only authorizing the union to act as bargaining representative, is a clear and explicit affirmation of the fact that the card can be used to secure recognition without an election. . . . To invalidate authorization cards relating solely to union representation, it is necessary that there be affirmative misrepresentation that the sole and only purpose of the card is to secure an election.

See also *UAW v. N.L.R.B. (Preston Products),* ___ F.2d ___ (C.A.D.C.), 66 LRRM 2548, 2552. Thus, in determining the validity of authorization cards it is necessary to ascertain whether "the employees, by their act of signing authorizations, thereby clearly manifested an intention to

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[20] A petition for rehearing *en banc* was denied by the court and rehearing (now pending) before the original panel was ordered.

designate the Union as their collective bargaining representative." *Englewood Lumber Company,* 130 NLRB 394, 395. Of paramount importance in determining that intent is "the overt act of the employees in signing cards designating the Union their bargaining representative. . . ." *Cumberland Shoe Corporation,* 144 NLRB 1268, 1269, enfd. 351 F.2d 917, 918-920 (C.A. 6). Thus an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought the card meant, cannot negative the overt action of having signed a card. *Joy Silk Mills, Inc. v. N.L.R.B.,* 185 F.2d 732, 743 (C.A.D.C.), cert. denied 341 U.S. 914. Also cited with approval in *N.L.R.B. v. Winn-Dixie Stores, Inc.,* 341 F.2d 750, 754 (C.A. 6), cert. denied 382 U.S. 830.

[13] The evidence and findings in the instant case establish that the cards made no mention of an election, and that no misrepresentations were made to employees to induce them to sign such cards. Accordingly, applying the rules laid down by the Board and the courts as indicated above, I find that the four disputed cards are valid designations and may be counted in computing the Union's majority status.[21] I, therefore, conclude that the Union had 9 valid cards in a unit consisting of 12 employees, more than enough to constitute a majority in that unit.

Respondent's reliance upon the recent decision in *N.L.R.B. v. Swan Super Cleaners,* 384 F.2d 609, 618 (C.A. 6), in support of its position that the four disputed cards

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[21] Ellis testified that he misunderstood the meaning of the card until a few days later when he realized the effect of what he had signed and attempted to revoke his card. In the absence of any misrepresentation Ellis' misunderstanding and attempted revocation did not invalidate his card for union recognition. The card was valid when signed and the attempted revocation took place after the demand for recognition had been made. *Cedar Hills Theatres, Inc.,* 168 NLRB No. 116.

should not be counted in computing the Union's majority status is misplaced. In that case the record contained evidence and the court found that the Union's majority rested upon four cards which had been obtained on representations "intended to lead to a belief that the only purpose of the card was to hold an election." The court also explicated that in its prior decisions it had not promulgated

> a rule that only where the solicitor of the card actually employs the specified words "this card is for the *sole* and *only* purpose of having an election" will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited, a belief that the *only purpose of the card is to obtain an election,* an invalidation of such card does not offend our *Cumberland* rule.

Inasmuch as no misrepresentations were found herein this holding of the court has no application to the instant case.

2. The effect of the card revocations.

In view of the findings above, that Respondent committed unfair labor practices in connection with the employee's petition to revoke their authorization cards, the revocations are without effect. Respondent cannot benefit from its unlawful conduct. *The Colson Corporation v. N.L.R.B.,* 347 F.2d 128, 134 (C.A. 8), cert. denied 382 U.S. 904, enfg. 148 NLRB 827; *Sullivan Surplus Sales, Inc.,* 152 NLRB, 132, 135. Furthermore, even if the revocations were obtained without any interference or coercion, they would have no effect because they were obtained after the demand for recognition was made at which time the Union already represented a majority of the employees. *Cedar Hills Theatres, Inc.,* 168 NLRB No. 116, 67 LRRM 1076.

3. Respondent's alleged good-faith doubt of the Union's majority status.

It is well settled that where valid authorization cards have been signed by a majority of the unit employees, the Employer violates Section 8(a)(5) [14] and (1) of the Act and, if he refuses to recognize and bargain with the Union, he may be ordered to do so unless such refusal is motivated by a good-faith doubt of the Union's majority status. See *N.L.R.B. v. Boot-Ster Manufacturing Company, Inc.*, 361 F.2d 325 (C.A. 6); *N.L.R.B. v. Cumberland Shoe Corporation, supra.* However, an employer's "good-faith doubt must have some reasonable basis and is not established merely by the employer's assertion of doubt of the majority." *N.L.R.B. v. Superior Sales, Inc.*, 366 F.2d 229, 237 (C.A. 8) and cases cited therein. The burden of proving a lack of good faith rests upon the General Counsel.[22] It can be established by proving that the Employer refused recognition in order to gain time within which to undermine the Union and destroy its majority. Such a determination requires an assessment ". . . of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." *Joy Silk Mills v. N.L.R.B., supra,* 742. However, not all unfair labor practices are of the kind or gravity to denote a purpose to deprive employees of their right to collective bargaining. *Aaron Bros. Co. of California,* 158 NLRB 1077. It is only those which necessarily have the object of destroying the Union's majority status that are of such gravity as to support a finding of the lack of good-faith doubt.

In the instant case, both the timing and the nature of Respondent's unfair labor practices show an intent to sub-

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[22] *John P. Serpa, Inc.*, 155 NLRB 99, 100.

vert the Union's majority. Thus, almost immediately following the Union's demand for recognition, Respondent sought to have the employees revoke their authorizations and explained to them how to do so. In addition, Respondent also invited employees to bypass the Union and deal directly with management concerning their complaints as they did prior to the Union's campaign, and engaged in making threats to employees that they could lose presently enjoyed privileges and benefits if the Union prevailed. Assessing the totality of Respondent's conduct, I find that it negates its contention that the refusal to bargain was motivated by a good-faith doubt of the Union's majority, and shows instead that the refusal was motivated by a desire to undermine the Union and avoid the statutory duty to bargain. *N.L.R.B. v. Cumberland Shoe Corporation, supra; N.L.R.B. v. Boot-Ster Manufacturing Co., supra.*

Accordingly, I find and conclude that the preponderance of the evidence shows that following the Union's demand, Respondent unlawfully refused to recognize and bargain with it in violation of Section 8(a)(5) and (1) of the Act.

IV. The Objections to the Election.

As related above, following an election on April 28, pursuant to a Decision and Direction of Election by the Regional Director, which the Union lost by a vote of eight to three, the Union filed objections to Respondent's conduct affecting the results of the election. By order of July 3, the Regional Director directed that the hearing on said objections be consolidated with the hearing in the complaint case, and that the objections be resolved herein. The objections, in substance, consist of matters alleged in

the [15] complaint case as constituting violations of Section 8(a) (1) of the Act. In view of my findings above, that Respondent engaged in violations of Section 8(a) (1) to the extent therein found, I find merit in and sustain said objections.

The Board has consistently held that conduct violative of Section 8(a) (1), *a fortiori,* interferes with the exercise of a free and untrammeled choice in an election.[23] Accordingly, I recommend that the election held herein be set aside. However, in view of my findings that Respondent's refusal to recognize and bargain with the Union violated Section 8(a) (5) of the Act, and my Recommended Order in that connection, I do not recommend that a new election be held.[24]

V. The Effects of the Unfair Labor Practices Upon Commerce.

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law.

Based upon the foregoing findings of fact and upon the entire record in this case, I make the following conclusions of law:

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[23] *Oleson's Food No. 4, Inc.,* 167 NLRB No. 69; *Irving Air Chute Company, Inc.,* 149 NLRB 627, 629.

[24] In view of these findings and recommendations, it would follow that the petition in Case 8-RC-6659 should be dismissed and that proceedings held therein be vacated.

1. At all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

2. At all times material herein, Respondent has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. All production and maintenance employees at the Employer's Willowick, Ohio, plant, including shipping and receiving employees, and regular part-time employees, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit apropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein since February 13, the Union has been the exclusive bargaining representative of all the employees in the aforesaid unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

[16] 6. By refusing since February 13, to bargain collectively with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent's conduct as found hereinabove improperly affected the results of the election held on April 28.

9. All allegations of the complaint as to which specific findings of violations have not been made, have not been sustained by the preponderance of the evidence.

The Remedy.

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act.

Having found that Respondent's conduct improperly affected the results of the election held herein, I shall recommend that the election be set aside.

Having found that the Union had a valid card majority and that Respondent did not have a good-faith doubt in refusing to bargain with the Union, and that it committed unfair labor practices to erode the Union's majority I shall recommend setting aside the election held herein and ordering the Respondent to recognize and bargain with the Union as the exclusive representative of the employees in the unit found appropriate herein.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER.

Stanley Air Tools, Division of the Stanley Works, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercising of their statutory rights within the meaning of Section 8(a)(1) of the Act, by interrogating them about union matters, inviting them to bypass

their exclusive bargaining representative with respect to their Union complaints, threatening them with economic reprisals in the event the Union prevailed, and soliciting and inducing them to withdraw from the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

[17] (c) Refusing to bargain collectively, upon request, with Teamsters Union Local No. 507, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the following appropriate unit, with respect to rates of pay, hours of employment, and other terms and conditions of employment.

> All production and maintenance employees at its Willowick, Ohio, plant, including shipping and receiving employees, and regular part-time employees, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Teamsters Union Local No. 507, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the collective-bargaining representative of all its employees in the above-described appropriate unit with respect to rates of pay, wages, hours of employment and other conditions of employment, and if, understanding is reached, embody such understanding in a signed contract.

(b) Post at its plan in Willowick, Ohio, copies of the

attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered with any other material.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[26]

I further recommend that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein, and that the election held herein on April 28, 1967, be set aside.

Dated at Washington, D. C. February 7, 1968.

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[25] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[26] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

This notice is posted pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board.

After a trial in which all parties had a chance to give evidence, a Trial Examiner of the National Labor Relations Board found that we, Stanley Air Tools, Division of the Stanley Works, violated the National Labor Relations Act and ordered us to post this notice to inform our employees of their rights.

The Trial Examiner's Recommended Order has directed us to assure our employees that:

WE WILL NOT question you about your union activities, threaten you with economic reprisals or that you will get fewer or less fringe benefits by joining or selecting Teamsters Union Local No. 507, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other union.

WE WILL NOT assist or induce you to withdraw from the aforesaid union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights to self-organization or to form, join, or assist any labor organization, or to bargain collectively with us concerning terms or conditions of employment through the representative you select, or to refrain from any of these activities if you so choose, except as these rights may be affected by a contract validly made under the National Labor Relations Act, whereby membership in a labor organization is a condition of employment after the 30th day following the date of the contract or the beginning of a person's employment, whichever is later.

WE WILL, upon request, bargain collectively with Teamsters Union Local No. 507, affiliated with

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all employees in the bargaining unit described below concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an agreement is reached, embody it in a signed agreement. The bargaining unit is:

> All production and maintenance employees at our Willowick, Ohio, plant, including shipping and receiving employees, and regular part-time employees, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

All our employees are free to become or remain or to refrain from becoming members of or withdrawing membership in, any labor organization.

STANLEY AIR TOOLS, DIVISION OF THE STANLEY WORKS
(Employer)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 1695, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 522-3715.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 8-CA-4634.

STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,

and

TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

Case 8-RC-6659.

STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,

Employer,

and

TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner.

DECISION AND ORDER.

(May 14, 1968.)

On February 7, 1968, Trial Examiner William W. Kapell issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended

that the complaint be dismissed with respect to those allegations.[1] Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in the case, including the Trial Examiner's Decision, the exceptions, and the supporting brief, and hereby adopts the findings,[3] conclusions, and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent Stanley Air Tools, Division of the Stanley Works, Willowick, Ohio, its officers, agents, successors, and assigns,

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[1] No exceptions having been taken to the Trial Examiner's dismissal of the allegation in the complaint as to alleged creation of the impression of surveillance of the employee's union activities by Respondent such action of the Trial Examiner is adopted *pro forma*.

[2] The Respondent's exceptions to the Trial Examiner's Decision are in large part directed to the credibility resolutions of the Trial Examiner. We will not overrule the Trial Examiner's resolutions as to credibility unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. Such a conclusion is not warranted here. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

[3] In adopting the Trial Examiner's finding that the Union's authorization cards were valid, Member Brown finds the cards valid—for the reasons set forth by him in *Dan Howard Mfg., Co.*, 158 NLRB 805, footnote 5.

shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS HEREBY FURTHER ORDERED that the petition in Case No. 8-RC-6659 be, and it hereby is, dismissed.

Dated, Washington, D. C., May 14, 1968.

GERALD A. BROWN, Member,
HOWARD JENKINS, JR., Member,
SAM ZAGORIA, Member,
National Labor Relations Board.

(SEAL)

SUPPLEMENTAL DECISION OF THE NATIONAL LABOR RELATIONS BOARD.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 8-CA-4634.
STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,
and
TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA.

Case 8-RC-6659.
STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,
Employer,
and
TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,
Petitioner.

SUPPLEMENTAL DECISION AND ORDER.

(November 10, 1969.)

On May 14, 1968, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, and ordering the Respondent to cease and desist therefrom and take certain affirmative

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[1] 171 NLRB No. 48.

action designed to effectuate the policies of the Act, including bargaining with the Union.

On June 16, 1969, the Supreme Court of the United States issued its opinion in *N. L. R. B. v. Gissel Packing Company,* 395 U.S. 575, affirming generally the Board's use of authorization cards in determining a union's majority status and the Board's power to issue a bargaining order based upon such showing where the employer's unfair labor practices had a tendency to undermine the Union's majority and impede the election process.

Thereafter, the United States Court of Appeals for the Fourth Circuit remanded the instant proceeding to the Board for reconsideration in the light of the Supreme Court's opinion in *Gissel.* On August 15, 1969, the Board issued a Notice permitting the parties to file statements of position with respect to the application of *Gissel* to this proceeding. Subsequently, the Respondent, the Charging Party, and the General Counsel filed statements in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

We have again reviewed the entire record, including the Statements of Position, and, having reconsidered the matter, affirm our original finding and order in this respect for the reasons stated below.

In our initial Decision we found in agreement with the Trial Examiner that the Respondent violated Section 8(a)(1) by: Coercively interrogating its employees about their union sympathies and activities; threatening economic reprisals, including loss of presently enjoyed privileges and benefits if the Union prevailed; seeking to have the employees revoke their authorization card and explaining to them how to do so; and inviting the employees to bypass the Union and deal directly with management

concerning their complaints as they had done prior to the Union's campaign. The Board also found that at the time of its original bargaining request the Union represented a majority of the Employer's employees in an appropriate unit and was entitled to recognition as their exclusive collective-bargaining representative, that the Employer, by insisting upon an election in the absence of a good-faith doubt and employing the time thus gained to dissipate the Union's majority, violated Section 8(a)(5), and issued a bargaining order.

In view of the principles set forth in the Supreme Court's opinion in *Gissel,* we find that by refusing to bargain with the Union and by engaging in a series of unfair labor practices to undermine the Union's majority status the Respondent violated Section 8(a)(5). The coercive effects of the Respondent's unfair labor practices cannot be eliminated by traditional remedies, and were of such a nature as to make a fair election doubtful, if not impossible. Under these circumstances, the purposes of the Act can better be effectuated by reliance on the employees' desires as expressed by signed authorization cards than on the results of a rerun election. Therefore, the bargaining order previously issued to remedy the Employer's unfair labor practices is appropriate to remedy its violations of Section 8(a)(5) and (1) of the Act and we shall affirm it.

SUPPLEMENTAL ORDER.

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby affirms its Order issued in this proceeding on May 14, 1968.

Dated, Washington, D. C., Nov. 10, 1969.

GERALD A. BROWN, Member,
HOWARD JENKINS, JR., Member,
SAM ZAGORIA, Member,
National Labor Relations Board.

(SEAL)

ORDER CORRECTING SUPPLEMENTAL DECISION AND ORDER OF THE BOARD.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 8-CA-4634.
STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,
and
TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA.

Case 8-RC-6659.
STANLEY AIR TOOLS, DIVISION OF
THE STANLEY WORKS,
Employer,
and
TEAMSTERS UNION LOCAL NO. 507, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,
Petitioner.

ORDER CORRECTING SUPPLEMENTAL DECISION AND ORDER.

(January 29, 1970.)

On November 10, 1969, the National Labor Relations Board issued a Supplemental Decision and Order[1] in the above-entitled proceeding in which an inadvertent error appears.

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[1] 179 NLRB No. 89.

IT IS HEREBY ORDERED that said Supplemental Decision and Order be, and it hereby is, corrected by striking from the eighth line on page 2 the words "the Charging Party."

IT IS FURTHER ORDERED that the Supplemental Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., January 29, 1970.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

PER CURIAM ORDER OF THE COURT OF APPEALS.

No. 20,171

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

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*NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

STANLEY AIR TOOLS, DIVISION OF THE STANLEY WORKS,

Respondent.

PER CURIAM ORDER.

Before: EDWARDS, CELEBREZZE and BROOKS, *Circuit Judges.*

The National Labor Relations Board seeks enforcement of its orders issued against Stanley Air Tools, Division of the Stanley Works. The Board's Decision and Order, issued May 4, 1968, is reported at 171 N.L.R.B. No. 48. The Board's supplemental Decision and Order, issued November 10, 1969, is reported at 179 N.L.R.B. No. 89. The Board found violations of Section 8(a)(1) of the Act due to respondent interfering with, restraining and coercing its employees so as to improperly affect the result of a Board election, and also that respondent's refusal to recognize and bargain with the Union was not based upon a good faith doubt of the Union's majority and was, therefore in violation of Section 8(a)(5) and (1) of the Act.

This case was first heard before National Labor Relations Board v. Gissel Packing Company, 395 U.S. 575

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* 8-CA-4634; 179 NLRB No. 89, Moore/Zirkin.

(1969) and then reconsidered after *Gissel* when it was remanded to the Board by the Fourth Circuit. The Board then found by supplemental decision: "The coercive effects of the Respondent's unfair labor practices cannot be eliminated by traditional remedies, and were of such a nature as to make a fair election doubtful, if not impossible."

The crucial factual issue decided by the Board was that the employee largely responsible for respondent's violations was a supervisor, and we conclude that there is substantial evidence on the record as a whole supporting this finding as well as the other findings of the Board.

Therefore, the Board's orders as issued shall be enforced.

Entered by order of the Court
CARL W. REUSS,
Clerk.

ORDER OF THE COURT OF APPEALS.

No. 20,171

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

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*NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

STANLEY AIR TOOLS, DIVISION OF THE STANLEY WORKS,

Respondent.

ORDER.

(Filed December 2, 1970.)

Before: EDWARDS, CELEBREZZE and BROOKS, *Circuit Judges.*

The petition for rehearing and suggestion for rehearing en banc having come on to be considered, and none of the judges of this Court who are in regular active service having favored ordering consideration en banc,

It is ORDERED that the petition be and it is hereby denied.

Entered by order of the Court,

CARL W. REUSS,

Clerk.

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* 8-CA-4634; 179 NLRB No. 89, Moore/Zirkin.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1403

STANLEY AIR TOOLS, A DIVISION OF THE STANLEY WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case presents the same basic question involved in *National Labor Relations Board* v. *American Cable Systems, Inc.*, No. 737, this Term, certiorari denied, December 14, 1970, and in *American Art Industries, Inc.* v. *National Labor Relations Board*, No. 995, this Term, certiorari denied, February 22, 1971. The issue is whether the Board may properly disregard the effect of post-election employee turnover in determining whether an employer's pre-election unfair labor practices preclude the holding of a fair representation election and warrant a bargaining order. In *American Cable*, one panel of the Fifth Circuit answered this question negatively (427 F. 2d 446); in *American Art*, another panel of that court answered it affirmatively (75 LRRM 2352), as did the Sixth Circuit here. See

also *G.P.D., Inc.* v. *National Labor Relations Board,* 430 F. 2d 963 (C.A. 6), certiorari denied March 22, 1971, No. 1169, this Term.

The Board believes that the court of appeals correctly decided this case in conformity with the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 610–611. Although the decision below is at odds with the Fifth Circuit's ruling in *American Cable,* that conflict was brought to the Court's attention in the *American Cable* petition (see Petition for the National Labor Relations Board, No. 737, this Term, pp. 9, 13).[1] Presumably the same considerations which led the Court to deny the petition in *American Cable,* as well as the subsequent petition in *American Art,* would also prompt it to deny the petition here. See also *National Labor Relations Board* v. *Clark's Gamble Corp.,* No. 265, this Term, certiorari denied, October 19, 1970. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

[1] Contrary to petitioner's assertion (Pet. 3, 15), *National Labor Relations Board* v. *General Stencils, Inc.,* 76 LRRM 2288 (C.A. 2), does not raise the same issue. The remand in that case was necessitated by the fact that the court had declined to enforce certain of the Board's unfair labor practice findings, and not because of the turnover question.

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